Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

SCHENLEY PRESS, INC.,
Petitioner

v.

COMPTROLLER OF THE TREASURY
OF THE
STATE OF MARYLAND,

Respondent

Petition for Writ of Certiorari to The
Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. DOES THE FIRST AMENDMENT PERMIT A STATE TO ENGAGE IN EXPLICIT INTRA-MEDIUM DISCRIMINATION BY IMPOSING A SALES AND USE TAX ON MONTHLY NEWSPAPERS THAT IT DOES NOT IMPOSE UPON DAILY AND WEEKLY NEWSPAPERS?

B. DOES A STATE SALES AND USE TAX EXEMPTION WHICH IN PRACTICE TENDS TO FAVOR LARGE METROPOLITAN DAILY NEWSPAPERS OVER SMALL AND LESS FREQUENTLY PUBLISHED NEWSPAPERS HAVE A "TENDENCY TO SUPPRESS PARTICULAR IDEAS" WITHIN THE MEANING OF FIRST AMENDMENT JURISPRUDENCE, AND THEREFORE CONTRAVENE INTERESTS PROTECTED BY THE FIRST AMENDMENT?

TABLE OF CONTENTS

I. REPORTS OF OPINIONS 1

II. JURISDICTION 1

III. CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED .. 1

IV. STATEMENT OF THE CASE 3

V. REASONS FOR GRANTING THE WRIT .. 7

A. The First Amendment does not permit a State to engage in explicit intra-medium discrimination by imposing a sales and use tax on monthly newspapers that it does not impose upon daily and weekly newspapers 7

B. A state sales and use tax exemption which in practice favors large metropolitan daily newspapers over small and less frequently published newspapers has a "tendency to suppress particular ideas" within the meaning of First Amendment jurisprudence, and therefore contravenes interests protected by the First Amendment 10

1. Tendency to Suppress 11

2. Particular Ideas 14

VI. CONCLUSION 16

TABLE OF AUTHORITIES

Constitutions

U.S. CONST., amend. I 1, 4, 6, 8-10

U.S. CONST., amend. XIV 2, 4

Statutes

28 U.S.C. § 1257 1

Md. Ann. Code, Tax-General Article, § 11-215(c) (1988) 2, 4, 5

Regulations

COMAR § 03.06.01.04 ..... 2, 4, 5

Cases

Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) 7, 12, 14

Grosjean v. American Press Co., 297 U.S. 233 (1936) . 7, 9, 12, 13

Leathers v. Medlock, 499 U.S. 439 (1991) ... 7-10, 12-14

Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) 7, 9, 12

I. REPORTS OF OPINIONS

Each of the decisions in this case is unreported. The decision of the Hearing Examiner of the Comptroller of the Treasury, dated January 29, 1991, is reprinted in the Appendix at Pages A5 - A10. The decision and Order of the Maryland Tax Court, dated November 21, 1991, are reprinted at Pages A11 - A16. The decision and Order of the Circuit Court for Baltimore City, dated December 8, 1992 and December 13, 1992, are reprinted at A17 - A23. The decision of the Maryland Court of Special Appeals, dated December 21, 1993, is reprinted at A24 - A42. The Order of the Maryland Court of Appeals denying certiorari, dated March 23, 1994, is reprinted at Page A43.

II. JURISDICTION

The Maryland Court of Appeals denied certiorari in this case on March 23, 1994. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

III. CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

First Amendment, United States Constitution

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment, United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Maryland Annotated Code, Tax-General Article, § 11-215(c) (1988)

(c) *Printed Material.* – The sales and use tax does not apply to:

(1) the printing and sale of newspapers ...

Code of Maryland Regulations (COMAR) § 03.06.01.04

A. The sale of newspapers is not subject to the tax.

(1) A publication is not a newspaper unless:

(a) It is published and distributed no less frequently than once each week;

(b) It does not, when its successive issues are put together, constitute a book;

(c) It is intended for circulation among the general public;

(d) It contains news items, legal and general intelligence, reports of current events, editorial comments, advertising matter, and other miscellaneous information of public interest generally found in the ordinary newspaper.

(2) The criteria set forth in §A(1), above, are minimum requirements, the meeting of which does not necessarily result in a publication being classified as a newspaper. A publication which meets the criteria set forth in §A(a), above, but which is in fact a magazine, shopping advertiser, community newsletter, tip sheet, or other publication which is not a newspaper in the common and popularly-accepted usage of the term, is not a newspaper for the purpose of this exemption. A publication is not disqualified solely because it is devoted primarily to matters of specialized interest, such as legal, mercantile, political, religious, or sporting matters.

IV. STATEMENT OF THE CASE

Schenley Press, Inc., the Petitioner ("Schenley"),[1] is the publisher of the Baltimore Chronicle ("the Chronicle"). The Chronicle was founded in 1973, and has been a monthly free-distribution community newspaper almost without exception since its founding. Several issues were

[1] In keeping with Rule 29, the Court is hereby notified that Schenley has no parents or subsidiaries.

placed in the record. As they demonstrate, and as was confirmed by undisputed testimony, the Chronicle is published in tabloid form on newsprint, in unstitched (i.e. unbound) form. It invariably contains a mix of features, local, national and international news reporting, editorial comment, community activity notices, news photography, and advertising, in proportions typical of the mix found in most acknowledged newspapers.

During the period May 1, 1986 through April 30, 1990 ("the tax period"), Schenley paid no sales or use tax on its purchases of supplies or its printing expenses connected with the Chronicle. During the tax period, Maryland's legislature exempted "newspapers" from the sales and use tax. Md. Ann. Code, Tax-General Art. § 11-215(c) ("the Exemption"). Despite the Chronicle's undisputed and indisputable status as a newspaper, on May 1, 1990, the Comptroller issued a Notice of Assessment to Schenley, Pet.App. at A3, for sales and use taxes allegedly accrued during the tax period, in reliance upon a regulation, ("the Regulation,") which thereafter in this case was held accurately to reflect the Legislature's intent to restrict the Exemption to publications which fit various criteria, including publication on a weekly or more frequent basis. COMAR §03.06.01.04A.

Schenley timely protested, and its protest was heard by a Hearing Examiner of the Comptroller. Before the Hearing Examiner, Schenley contended that if the Chronicle were excluded from the benefit of the Exemption, then the Exemption as applied violated the First and Fourteenth Amendments of the United States Constitution, because it constituted intra-medium discrimination, and it had a tendency to "suppress particular ideas" within the meaning of First Amendment jurisprudence.

The Hearing Examiner issued a ruling on January 29, 1991, Pet.App. at 5, affirming the assessment with stipulated modifications. The Hearing Examiner upheld Schenley's challenge to the Regulation on state law grounds, and declined to address the constitutional issue on the ground that he lacked the jurisdiction to do so. Schenley brought a timely appeal from that decision, by Petition of Appeal filed February 26, 1991.

The matter came on for hearing in the Maryland Tax Court on November 21, 1991, before Judge Walter C. Martz II. There testimony was adduced as to the Chronicle's status as a newspaper. As was noted by expert witness Theo Lippman, Jr. (a long-time writer for the Baltimore Sun and occasional college lecturer on journalistic subjects), the Chronicle sometimes carries significant local news not reported in the Baltimore area's major metropolitan dailies, the Sun and the Evening Sun. Both expert witnesses called by Schenley, Mr. Lippman and Prof. Leo Jeffres of Cleveland State University, opined that the Chronicle is a newspaper, as that term is used both professionally within the journalism profession, and in common parlance. This testimony was uncontradicted in any way, and indeed the Comptroller's counsel at one point in the proceedings referred to the Chronicle as a newspaper.[2] The Tax Court ruled in Schenley's favor on state law grounds.[3] Schenley made its record with respect to Constitutional contentions before Judge Martz, but he did not address the

[2] A copy of this publication is lodged, with permission, with the Clerk of the Court.

[3] The Tax Court ruled that the Regulation as applied exceeded the Comptroller's statutory authority, inasmuch as the Exemption by its explicit terms extends to "newspapers," and not newspapers which publish weekly or more frequently.

First Amendment issue. The Comptroller noted an appeal to the Circuit Court for Baltimore City.

There the matter was heard by Judge Robert I. H. Hammerman. He heard argument on the constitutional issues on December 4, 1992,[4] and ruled against Schenley on them, Pet.App. at 17. Though he concluded that for constitutional purposes the Chronicle is a newspaper,[5] he nonetheless held without elaborating that he did not think there was intra-medium discrimination, Pet. App. at 19. With respect to "suppression of particular ideas" within the meaning of First Amendment jurisprudence, he held that the factual record made by Schenley was inadequate to constitute the necessary showing as to suppression, though he seemed to concede that "particular ideas" had been shown, Pet. App. at 18. His ruling was memorialized by a summary written order dated December 8, 1992, Pet.App. at 23.

Schenley thereafter appealed the case to Maryland's Court of Special Appeals. In a per curiam ruling of December 21, 1993, Pet.App. at 24, that Court affirmed the Circuit Court in all particulars. Inter alia, the Court of Special Appeals held that Maryland's explicit intra-medium discrimination did not violate the First Amendment, and that there was no showing of a threat of "suppression of particular ideas."

[4] Having reversed the Tax Court on state law issues at an earlier hearing.

[5] The Circuit Court stated, at the end of the argument restricted to constitutional law issues: "I am persuaded by the record in this case ... that the Baltimore Chronicle certainly deserves the appellation of a newspaper." Pet.App. at 18.

Schenley sought certiorari from Maryland's highest court, the Court of Appeals, but the writ was denied by that court's order dated March 23, 1994, Pet.App. at 43.

V. REASONS FOR GRANTING THE WRIT

This case raises important and unresolved issues regarding the ability of the State to impose a discriminatory tax on different newspapers based solely on the frequency of their publication.

A. The First Amendment does not permit a State to engage in explicit intra-medium discrimination by imposing a sales and use tax on monthly newspapers that it does not impose upon daily and weekly newspapers

This Court has long been skeptical of discriminatory taxes within a single medium. In Grosjean v. American Press Co., 297 U.S. 233 (1936), this Court struck down a Louisiana tax which fell only on the largest newspapers. In Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983), the Supreme Court squarely held that a similar sales tax discriminating against the largest newspapers, whether or not it was intended to suppress particular speech, violated the First Amendment. In Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987), this Court also struck down a sales tax on magazines which burdened only a few of them. The reasoning was the same. Up until the time of Leathers v. Medlock, 499 U.S. 439 (1991), this Court had never upheld a tax upon some members of a medium and not others. Nor did this

Court do so in Leathers, since that case concerned a tax that discriminated among media, rather than within a medium.[6]

However, there were dicta in Leathers which seemed to imply that there was no First Amendment problem raised by intra-medium discrimination. The dicta ran as follows:

> Petitioners argue that such intermedia and intramedia discrimination, even in the absence of any evidence of intent to suppress speech or of any effect on the expression of particular ideas, violates the First Amendment. Our cases do not support such a rule.

499 U.S. at 450. Even though the Court of Special Appeals correctly concluded that Leathers was not itself a case of

[6] This Court refused to endorse the Arkansas Supreme Court's view that cable and satellite TV were the same medium. The Court wrote: "That the Arkansas Supreme Court found cable and satellite television to be the same medium does not change this conclusion. Even if we accept this finding ... " 499 U.S. at 449. [Emphasis added.] That this Court did not accept this finding is made clear by the way the Court articulated the issue it saw as being before it: "[W]hether the First Amendment prevents a State from imposing its sales tax on only selected segments of the media." 499 U.S. at 444. And lest there be any confusion whether "segments of the media" means different media, the Court states elsewhere that "[t]he Arkansas Legislature has chosen simply to exclude or exempt certain media from a generally applicable tax." 499 U.S. at 453. As the initial discussion of the Court made plain, the tax law challenged put cable television on one side and satellite, newspapers, and magazines on the other. 499 U.S. at 442. Moreover, characterizing the cable companies' Equal Protection Clause arguments before the Arkansas Supreme Court, this Court wrote of "the State's tax distinction between cable and other media." 499 U.S. at 453. [Emphasis added.] The Court of Special Appeals agreed that Leathers was a case of intra-medium discrimination, Pet.App. at 38.

intra-medium discrimination, that Court nonetheless read Leathers as a holding that there must be some invidious intent to suppress particular points of view or punish particular speakers, similar to the animus that had been a fact of Grosjean, before intra-medium discrimination becomes offensive. Even the quoted dicta, however seem to make "any effect on the expression of particular ideas" an alternative to intent to suppress as an element of a prima facie violation.

Schenley contends that, from a First Amendment standpoint, the effect of intra-medium discrimination is almost always sure to be invidious. Where the State decides to create an exemption for a medium, it has made a policy decision to subsidize speech in that medium. If it then withdraws that subsidy for some speakers but not others, the State abandons its proper position of neutrality among similarly-situated speakers.[7] While there may be no conscious intent to differentiate on the basis of content, that effect is almost sure to follow, since (as is hardly any secret and as was proved with respect to this case) the various parts of a medium that can be differentiated for tax purposes tend to harbor different kinds of speakers.

And even if there were no obviously identifiable difference in the kinds of speakers or the content of the speech, there would still remain a difference in audience served, and/or even in the very frequency of audience attention, that would seem to raise First Amendment concerns.

[7] This scenario is somewhat the converse of that in Minneapolis Star and Grosjean, where there was no broad-based tax on most newspapers, but there was a tax imposed on the largest ones. But this is a distinction without a difference. Whether the discrimination occurs via a narrow-based tax or via an exemption from a broad-based tax, the effect is the same: the tax is likely to burden certain kinds of speakers more than it burdens others.

For instance, if the Exemption and the Regulation affected magazines instead of newspapers, Time and the New Yorker would be exempt, but not the Atlantic Monthly or Harper's. Such discrimination would seem on its face to raise First Amendment problems. The State should not be in the business of discriminating arbitrarily for tax purposes among similar speakers within a medium any more than it should be discriminating intentionally among dissimilar ones.

The law on this point therefore needs to be authoritatively restated.

B. **A state sales and use tax exemption which in practice favors large metropolitan daily newspapers over small and less frequently published newspapers has a "tendency to suppress particular ideas" within the meaning of First Amendment jurisprudence, and therefore contravenes interests protected by the First Amendment**

After Leathers, there can be no doubt that, where the State differentially taxes speech, "tendency to suppress particular ideas" is the classic prima facie First Amendment violation. Less clear is what a speaker subject to such discrimination must prove in order to establish the existence of such a violation. We know examples of ways in which such suppression may be accomplished,[8] but there is little clarity as to what constitutes its essence. This case demonstrates the remaining confusion.

[8] Such suppression may be accomplished by means which include: a) singling out the press as a whole; b) targeting a small group of speakers; or c) discriminating on the basis of content.

In this case, Schenley showed that the tax discrimination in question would curtail the number of pages in its paper, and would also threaten its survival. Schenley also showed that, nationally, forty percent of the "grassroots press" tends to publish less frequently than weekly and to be among the economically weaker players in the newspaper markets.[9] ("The grassroots press" is comprised of newspapers that serve particular small geographic, social, or ethnic communities.) The Circuit Court held this to be an inadequate showing of "tendency to suppress."

In this case, likewise, Schenley showed that the Chronicle reported stories not covered by Baltimore's metropolitan dailies, and that it provided a forum for voices of political dissent not often heard in the big dailies. The Court of Special Appeals nonetheless held this to be an inadequate showing of "particular ideas."

Even more remarkably, the Circuit Court had little difficulty accepting that the Chronicle was a channel for "particular ideas," while the Court of Special Appeals appeared satisfied with Schenley's showing of "tendency to suppress." In short, this case demonstrates the potential for confusion in the present articulations of the law.

1. Tendency to Suppress

More specifically, the Circuit Court faulted Schenley's showing of "tendency to suppress" for essentially three reasons. First, it felt that the one tax should not be considered in a vacuum; that it should be considered along

[9] As opposed to the large metropolitan newspapers, of which this Court may take notice, and the courts and administrative bodies below should have taken notice, that these are virtually all daily or weekly.

with all other taxes, including those, like unemployment tax, which might burden larger papers more than smaller ones. Second, it felt that the testimony failed to establish "dire economic consequences [to Schenley] because of this exemption, nor to the 'industry as a whole,' to wit, the grassroots press as a whole in the State of Maryland." Third, at various points the Circuit Court made plain it felt discomfort that no record was made of the comparative numbers of specifically Maryland newspapers affected and unaffected by the exemption.

Minneapolis Star ought to have disposed of the first criticism. In that case, Minnesota had tried to argue that, after a detailed analysis, one could conclude that its tax structure actually favored larger newspapers rather than discriminating against them. This Court responded that "courts as institutions are poorly equipped" to perform such an evaluation, 460 U.S. at 589, and went ahead to strike down the tax because on its face it discriminated. The Court explicitly declined to inquire into possible offsets buried elsewhere in the overall tax structure.

As to the second criticism, the Circuit Court seemed to equate tendency to suppress with "dire economic consequences." If so, then neither Minneapolis Star, Grosjean, nor Arkansas Writers Project was correctly decided,[10] because in none of those cases, so far as the record shows, was this showing made. In Grosjean, for instance, the whole relevant analysis read as follows:

> As applied to appellees, it is a tax of two per cent. on the gross receipts derived from advertisements carried in their newspapers when, and only when,

[10] Leathers explicitly interpreted each of these cases as involving a tax that tended to suppress "particular ideas." 499 U.S. at 447.

> carried in their newspapers when, and only when, the newspapers of each enjoy a circulation of more than 20,000 copies per week. It thus operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising, and, second, its direct tendency is to restrict circulation. This is plain enough when we consider that, if it were increased to a high degree, as it could be if valid, [citation omitted], it might well result in destroying both advertising and circulation.

233 U.S. at 244-45. Hence, tendency toward suppression does not require catastrophic results, so long as such results would occur if the tax "were increased to a high degree."

As to the Circuit Court's final problem, numbers would become important in the "targeting a small number of speakers" scenario – one of the possible ways identified by Leathers of suppressing particular ideas. But Schenley was not making that kind of argument. Schenley instead was arguing that in a monopoly- or near-monopoly newspaper town, it is obvious on its face, with no need for statistics, that a tax exemption extended to the big papers and denied to any small paper which can show it is a vehicle of "particular ideas" is an unconstitutional discrimination.

Obviously, the kind of errors the Circuit Court made here, especially the second, result in part from the vagueness of the formula "tendency to suppress," and the absence of guidance to date from this Court as to the meaning of the formula.

2. Particular Ideas

The nature of "particular ideas" has proved in this case to be as elusive as that of "tendency to suppress." Interestingly, though "tendency to suppress particular ideas" is the linchpin of Leathers, that case seems not to define "particular ideas" in any systematic way. We know that where there is differential taxation on the basis of content, as in Arkansas Writers' Project, that poses a threat of suppressing "particular ideas." We know also from a hypothetical in Leathers that if a small number of speakers is subject to discrimination, there is a danger to "particular ideas." But these are presented in Leathers only as suggestive examples. The absence of a more generally applicable formula hobbled analysis in this case.

Here there was testimony by Alice Cherbonnier, managing editor of the newspaper, establishing that the Chronicle tries to be a unique voice, open to news sources the Sunpapers do not listen to, and carries a four-page insert put together by the Baltimore News Network, whose purpose "is to disseminate thoughtful information regarding issues and stories that would not normally see the light of day probably in this town." Many of the regular writers in the Chronicle are political activists who cannot hope for frequent access to the Sunpapers or other media. A review of the sample copies of the Chronicle entered in the record should have confirmed this. It amounts to a conclusive case of "particularity" in a near-monopoly newspaper town.

The Circuit Court evidently agreed,[11] and it was not seriously contested by the Comptroller.

Oddly, however, the Court of Special Appeals refused to accept the Chronicle's case in this regard. The Court of Special Appeals seemed to feel that if grassroots papers and metropolitan dailies both serve the same audience, as Professor Jeffres testified they do (albeit in different ways), they are not in competition, and thus the ideas of the grassroots press are not "particular" in contrast to those of the metropolitan dailies. This seems like a total non sequitur, but no less dangerous for its lack of logic. The notion that if two speakers address the same audience their ideas cannot be in competition, let alone "particular," would carry with it the potential for eviscerating all First Amendment jurisprudence.

Yet without more precise articulation of what constitutes "particularity," peculiar results like the Court of Special Appeals' reading of the phrase are unfortunately quite likely to continue.

[11] The Judge stated:

> The whole history of our country shows that it is this grassroots press that has paved the way for so much enormous progress and improvements and changes in our country. They are of an entirely different breed than your large metropolitan daily press and they fill a different niche altogether, and I think an extremely important niche. And I think their niche becomes more and more important every day as we have fewer and fewer daily publications.

Pet. App. at 18. That the Chronicle is included may be gleaned from his remark, id., concerning "the vital role that publications like the Baltimore Chronicle play in our society."

VI. CONCLUSION

For all these reasons, this Court should grant certiorari to consider the presented questions.

Respectfully submitted

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APPENDIX

Contents

APPENDIX A: NOTICE OF ASSESSMENT .. 3
APPENDIX B: HEARING EXAMINER RULING 5
APPENDIX C: TAX COURT RULING 11
APPENDIX D: TAX COURT ORDER 15
APPENDIX E: CIRCUIT COURT RULING .. 17
APPENDIX F: CIRCUIT COURT ORDER .. 23
APPENDIX G: COURT OF SPECIAL APPEALS RULING 24
APPENDIX H: COURT OF APPEALS RULING 43

APPENDIX A: NOTICE OF ASSESSMENT

SALES AND USE TAX DIVISION
301 WEST PRESTON STREET

NOTICE OF ASSESSMENT

Schenley Press, Inc.
30 W.25th Street
Baltimore, Maryland
21218

Registration No. 0198659
Admissions Tax No.
Assessment Date June 15, 1990
Case No. 33827 01

Sales and Use Tax
$6,256.07
Interest Accrued to Date
1,649.10
Penalty 625.61

$8,530.78

Admission and Amusement Tax
Interest Accrued to Date
Penalty

$_____

TOTAL $85,530.78

Auditor M. Dent 213/316/23.4
Sales and Use Tax Period 5-1-86 thru 4-30-90
Admissions and Amusement Tax Period _____

Payment of this assessment should be made by check or money order payable to the "Comptroller of the Treasury" and forwarded to the attention of the undersigned.

Interest accrues for each month or fraction of a month from the time the taxes were originally due until paid.

If you disagree with the assessment and wish to have it reviewed, you must make an application for revision in writing, to the attention of the undersigned, within 30 days of the date of this notice. If no application is received within this 30-day period, the assessment will become FINAL. State law prohibits the adjustment of an assessment which has become final. Any representation made by ANY person that an adjustment to this assessment will be made without application to the undersigned is erroneous and may not be relied upon.

If neither payment nor a request for revision is received within 30 days, collection proceedings will be instituted, including, if necessary, the filing of liens and the issuance of attachments.

READ THIS NOTICE WITH CARE: YOU MUST ACT WITHIN 30 DAYS OF THE ASSESSMENT DATE IF YOU WISH TO PRESERVE YOUR APPEAL RIGHTS.

George P. Martel
Assessment Officer
(301) 225-1572

APPENDIX B: HEARING EXAMINER RULING

BEFORE THE
COMPTROLLER OF THE TREASURY
SALES AND USE TAX DIVISION

IN THE MATTER OF :	Sales/Use Tax Case No. 33827
Schenley Press, Inc.	
30 W. 25th Street	Tax Amount: $6,256.07
Baltimore, Maryland 21218	Period Covered: 5/1/86 - 4/30/90

* * * * * * *

OPINION

As a result of an audit, the Sales and Use Tax Division (hereinafter sometimes referred to as the "Division") levied an assessment against Schenley Press, Inc. on June 15, 1990 in the amount of $6,256.07 for the period May 1, 1986 through April 30, 1990.

Taxpayer publishes a monthly newspaper entitled the "Chronicle" which, except for a small number of subscribers, is distributed to the public without charge. The form and content of the Chronicle is similar to other newspapers distributed on a daily or weekly basis. The Taxpayers, apparently claiming the benefit of the newspaper exemption contained in §11-215 of the Tax-General Article of the

Annotated Code of Maryland,[1] did not pay any sales and use tax on its purchases of supplies or the Chronicle's printing expenses.

Since the Chronicle was distributed monthly, the auditor concluded that the Chronicle did not qualify for the exemption of §11-215, and levied an assessment for the unpaid sales tax.

The Taxpayer contends that the Comptroller's Regulation .03.06.01.04[2] limiting the newspaper exemption to those newspapers distributed no less frequently than once each week is at variance with the statute. Alternatively, Taxpayer contends that the frequency limitation is unconstitutional. Taxpayer did not raise any issue with the auditor's computation or methodology.

The Division contends that the hearing officer in this formal proceeding must follow the clear dictate of COMAR 03.06.01.04 and uphold the assessment as levied.

The Division does, however, concede that since Taxpayer produced evidence that 250 copies were actually sold to subscribers to this extent [sic], Taxpayer is entitled to a resale exclusion credit in the amount of $51.54.

At the conclusion of the hearing, Taxpayer requested that the record be left open to allow for the submission of case law on the constitutionality of the newspaper exclusion contained in §11-215(c) and COMAR 03.06.01.04.

[1] Effective January 1, 1989, revised sales and use tax provisions are compiled in Md. Tax-Gen. Code Ann. Title 11 (1988). At all times relevant to the proceeding herein, the codification of the Retail Sales Tax Act and the Use Tax Act in Article 81 of the Annotated Code of Maryland, Sections 324-401, was in effect. All references in this Decision are to Article 81.

[2] COMAR 03.06.01.05 prior to January 1, 1990.

Issue

Whether the hearing officer has the power to entertain and dispose of constitutional challenges to this taxing statute.

Decision

Section 11-215(c) of the Tax-General Article of the Annotated Code of Maryland provides as follows:

> "(c) Printed material.-Except as provided in §9-1707(g)(2) of the Environment Article, the sales and use tax does not apply to:
> (1) the printing and sale of newspaper . . . "

The Comptroller, pursuant to his regulation powers, promulgated Regulation .01.04, which states as follows:

> "A. The sale of newspapers is not subject to the tax.
>
> (1) A publication is not a newspaper unless:
>
> (a) It is published and distributed no less frequently than once each week;
> (b) It does not, when its successive issues are put together, constitute a book;
> (c) It is intended for circulation among the general public;
> (d) It contains news items, legal and general intelligence, reports of current events, editorial comments, advertising matter, and other miscellaneous information of public interest generally found in the ordinary newspaper.
> (2) The criteria set forth in §A(1), above, are minimum requirements, the meeting of which does not necessarily result in a publication being classi-

fied as a newspaper. A publication which meets the criteria set forth in §A(1), above, but which is in fact a magazine, shopping advertiser, community newsletter, tip sheet, or other publication which is not a newspaper in the common and popularly-accepted usage of the term, is not a newspaper for the purpose of this exemption. A publication is not disqualified solely because it is devoted primarily to matters of specialized interest, such as legal, mercantile, political, religious, or sporting matters.

(3) The sale of an item which is to be distributed as a component part of a newspaper, such as an advertising supplement, is not subject to the tax."

The Chronicle, which looks, feels and reads like an ordinary newspaper distributed on a daily basis, is published only once every month. This infrequency of publication, when measured against the Comptroller's Regulation, clearly disqualifies it from the exemption of §11-215.

Taxpayer, however, seeks to hold, as unconstitutional, the definition placed upon newspapers by Comptroller's Regulation 01.04.

Generally speaking, the power to declare a statute or Regulation unconstitutional rests with the judiciary. Maryland Committee for Fair Representation v. Tawes, 228 Md. 412, 180 A.2d 656 (1962), reversed on other grounds. 377 U.S. 656, 89 S.Ct. 1929 12 L.Ed. 2d 595; State v. Magolia, 182 Md. 122, 32 A.2d 477 (1993); Barnes v. Meleski, 211 Md. 182, 126 A.2d 599 (1956). An administrative agency, and this hearing officer, does not have the power to declare a statute unconstitutional. To attempt to do so would be an impermissible encroachment upon the powers granted to the judiciary by the state Constitution. See, Article IV of the Constitution of Maryland and the

annotations contained therein. The role of the hearing officer in this formal hearing is to review the evidence, make conclusions of fact and determine whether the law was correctly applied to the facts shown by the evidence.

Section 2-103 of the Tax-General Article empowers the Comptroller to adopt reasonable regulations to administer the provisions of, among others, the sales and use tax. The Comptroller, by limiting the exemption to those newspapers that are distributed at least once every week merely adopted the commonly understood meaning. Webster's Third New International Dictionary, defines a newspaper as "a paper that is printed and distributed daily, weekly, or at some other regular and usually short interval. (Merriam-Webster, Inc., 1981).

The interpretation placed by the Comptroller upon a taxing statute is entitled to great weight as an administrative interpretation acquiesced in by the legislature. Comptroller v. H. E. Rockhill, Inc., 205 Md. 226, 107 A.2d 93 (1959); Palm Oil Recovery Inc. v. Comptroller, 266 Md. 148, 291 A.2d 681 (1972). Without substantial justification, which has not been shown, the Comptroller's interpretation will not be disturbed.

Since the Taxpayer had not paid the sales and use tax on its purchases of supplies and the cost of printing the newspaper (Section 11-101(j)), the auditor correctly entered an assessment once she concluded that Taxpayer did not qualify for the exemption contained in §11-215.

Conclusion

The assessment, as adjusted, is affirmed. Penalty is abated.

As of 1/1/91, the assessment is as follows:

$ 6,204.53	Tax
2,037.57	Interest (thru 1/31/91)
$ 8,242.10	Total

John B. Stolarz
Hearing Officer

January 29, 1991

APPENDIX C: TAX COURT RULING

MARYLAND TAX COURT
34 Market Place
Baltimore, Md. 21202

SCHENLEY PRESS, INC.	)	
	)	
- VS -	)	SALES TAX
	)	NO. 508
COMPTROLLER OF THE TREASURY	)	
	)	
SALES TAX DIVISION	)	

Baltimore, Maryland
November 21, 1991

BEFORE: JUDGE WALTER C. MARTZ, II

APPEARANCES:

ON BEHALF OF THE PETITIONER:
JACK L. B. GOHN, ESQUIRE

ON BEHALF OF THE RESPONDENT:
SHELDON H. LASKIN, ESQUIRE

EXCERPT OF PROCEEDINGS

JUDGE MARTZ: All right, this is the case of Schenley Press, Inc. versus Comptroller of the Treasury, Sales Tax No. 508.

The facts are really not in dispute here. It's generally a question of law. The question in this case is whether or not

Schenley Press, Inc. is entitled to an exemption for tax purposes, on the basis that it is a newspaper.

The Comptroller has conceded that the Chronicle would fall within the definition of a newspaper but for its frequency of publication.

In Pennysaver versus Comptroller, 326 Md. 697, 1991, the Court stated that quote "That the term newspaper is not defined in the statute. Regulations of the Comptroller set forth standards for determining whether a publication is a newspaper. The Comptroller's rules suggest that a publication is a newspaper, among other things, if it is published no less frequently than once a week."

The Comptroller relies on Article 1, Section 28 and a definitional – a dictionary definition as the basis for this particular rule. With respect to Article 1, Section 28, the Court finds that that reliance is inappropriate, due to the fact that the definition of a newspaper is for a particular purpose; that is for legal notices for foreclosure ads, etcetera.

With respect to the dictionary definition, which generally provide that a newspaper is usually published daily or weekly, we want to state that usually does not mean always. Thus the dictionary definition, in the Court's opinion, is not conclusive.

In Pennysaver, the Court referred to common and ordinary parlance in defining the term newspaper. And that is how we will determine whether in fact the Chronicle is a newspaper.

After reviewing all of the evidence, the Court finds that the Chronicle is a newspaper and should be categorized as such. Two experts have testified that the Chronicle is a newspaper to the public, and also in professional eyes. The Comptroller concedes that the Chronicle would be a newspaper but for the fact it is published monthly.

Historically it should be noted that newspapers have really come full circle in terms of frequency of publication. Thus the term newspaper is an evolving term. When the legislature uses a word or a term of common meaning or understanding, common parlance, that common meaning must prevail over the rule making authority of the Comptroller.

The Comptroller can define the term newspaper, but he cannot exclude by rule or regulation what would be commonly understood to be a newspaper. Such an exclusion by the Comptroller would not be in accordance with law.

We note that in the Pennysaver case, the Court ruled that – in making an analogy to the Batterton case, that the rule making authority could only be set aside if the regulation is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.

Under the facts in this case, the regulation is not in accordance with law. Therefore, we conclude that the definition of newspaper does not include the limitation of quote "not less frequently than once each week," end of quote, as provided for in the Comptroller's regulation.

While we agree that a line may have to be drawn as far as frequency of publication, we are not asked to and we will not draw such a line. In this case it is clear that the Chronicle meets the standard required to entitle it to the newspaper exemption.

It should be pointed out that newspapers have served and continue to serve the function of providing the public with a timely, inexpensive source of news. The purpose of the exemption is not to unduly burden the production of other types of publications, but instead to perpetuate the existence of timely, inexpensive newspapers.

The Chronicle is a newspaper and should be afforded the exemption. Accordingly the Court will reverse the assessment in this case. Thank you.

APPENDIX D: TAX COURT ORDER

IN THE MARYLAND TAX COURT

SCHENLEY PRESS, INC.,*

Petitioner *

v. * Sales Tax No. 508

COMPTROLLER OF THE*
TREASURY,

*

Respondent

*

* * * * * * * *

ORDER GRANTING JUDGMENT AND ABATING TAX

FOR THE REASONS STATED ON THE RECORD at the hearing held in the above-captioned matter on November 21, 1991, it is this 13th day of December, 1991, by the Maryland Tax Court ORDERED that:

1. Judgment be and the same hereby is rendered in the above-captioned appeal on behalf of Petitioner Schenley Press, Inc.;

2. The tax assessment asserted by the Respondent, the Comptroller of the Treasury, in the amount of $6,204.53 tax and $2,037.57 interest, for a total of $8,242.10 be and the same hereby is ABATED; and

3. The Clerk of the Court shall send copies of this Order to counsel for the parties.

CERTIFIED TRUE
COPY
TEST: ROBERT L.
ZOUCK, CLERK

APPENDIX E: CIRCUIT COURT RULING

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

COMPTROLLER OF THE TREASURY,
Appellant,

vs.

Case No.
92007030/CL142481

SCHENLEY PRESS, INC.,
Appellee.

_____/

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

Baltimore, Maryland
Friday, December 4, 1992

BEFORE:
THE HONORABLE ROBERT I. H. HAMMERMAN, CHIEF JUDGE

APPEARANCES:
For the Appellant:
SHELDON LASKIN, ESQ.
For the Appellee:
JACK GOHN, ESQ.

THE COURT: On the record, please. I'm going to reverse the Tax Court's holding that Regulation 10104(A)(1)(a) is inconsistent with the Tax General Article 11-215(C)(1), and I am going to remand this case to the Tax Court with the direction to dismiss the petition of appeal.

Obviously, I do not agree with the reasoning of the Tax Court. It's solely a question of law, and the normal scope of review principles do not apply when it's solely a question of law. I have to suppress my own ideas in making this ruling because my own ideas are I don't like the regulations. I just don't like them. I am persuaded by the record in this case, the expert testimony of Professor Jeffres, Theo Lippman, who is a very revered and acknowledged journalistic expert in our own community, that the Baltimore Chronicle certainly deserves the appellation of a newspaper. I have always felt very strongly about the very observations that Mr. Gohn, who has so ably represented the newspaper in this litigation, has expressed both in his briefs and in his oral argument today of the vital role that publications like the Baltimore Chronicle play in our society. It scares me, it really scares me, as I was alluding to before, to see the tremendous constriction in the flow of news, knowledge, information, studies, investigations to the public today. The whole history of our country shows that it is this grassroots press that has paved the way for so much enormous progress and improvements and changes in our country. They are of an entirely different breed than your large metropolitan daily press and they fill a different niche altogether, and I think an extremely important niche. And I think their niche becomes more and more important every day as we have fewer and fewer daily publications. The evils of a monopoly are apparent to us all. Justice

Brandeis railed against the evils of monopoly. His professional career as a lawyer in Boston before he became a Justice was to rail against the evils of monopoly. And when you come to a monopoly of the press, I think the evils to the public multiply many, many fold because they then cease to be economic evils. If there is a monopoly in industries, the consumer may get inferior products, may have to pay more money for inferior products and can do nothing about it. It's a dollars and cents thing. But when you are dealing with the press and dealing with publications, the press, the media in general, television, radio, the evils that can inure because of monopolization or near monopolization are frightening. And thus, to me, the role of the alternative press, the grassroots press, whatever you want to call it, is more and more and more important.

So I have to suppress – talk about suppression of speech – I have to suppress my thoughts. And it's these thoughts that I have and these impulses that I feel that caused me at the time of our last hearing to want to explore this thoroughly. I just did not think it had been explored thoroughly enough and it bothered me. It really bothered me. And I felt since it had not been explored thoroughly enough, I didn't want this case to be decided without it being explored as thoroughly as it could be. And I appreciate very much the efforts of all counsel in doing that.

But my job was not to give in to my feelings or to my thoughts. My job is to interpret the law, rightly or wrongly, as I find it to be. And I am reminded too often, more often than I would like, by our appellate courts that I have decided the law wrong. But that's the occupational hazard.

I believe that the regulation is lawful, that the exemption is lawful. I do so for two reasons essentially. The first is that I don't think we have suppression of ideas here. I don't think there's any attack on content of speech. I don't

think we have intra-media discrimination. I agree with the position of the Comptroller that this is a generally applicable tax. It's a sales tax and it's generally applicable with very, very narrow exemptions. The fact that the beneficiary of the exemption – as I say, I think they're very, very narrow – the fact that the beneficiary may reap a financial benefit that most of the others, numerically speaking, do not have, to me, does not necessarily tell the whole story. I think you can only tell the whole story when you look at the total tax burden that may be placed on one as against another. What has the state done to all of the media, vis-a-vis taxes, rather than slicing out one little part and saying this is an assault on freedom of speech, it cannot stand. There is no suggestion here, it seems to me, that there is any invidious discrimination generally speaking by the tax laws of Maryland against the grassroots press. As far as we may know, the record doesn't show it, the tax burdens of the State of Maryland and all the regulations promulgated by the Comptroller may put proportionately a much greater tax burden on the daily press than it does on the alternative press. Nothing has been shown to the contrary.

Anything that places an economic burden on a component of the media has a tendency to perhaps diminish the voice of that component. But the same can be said of labor situations. The same can be said of other economic conditions, like the cost of having to buy paper, the cost of having to buy ink, other products that newspapers use. Anything that makes it tougher for a publication to exist or any component of the entire media family to exist makes it harder to exert the free speech that these components are entitled to. But there are many factors that may unfortunately extinguish the speech altogether. There are many

factors totally unrelated to taxes that may cause components in the media to shrink their voice some.

I think there is a rational basis here. I don't think there's been any showing there hasn't been. I think there's a compelling state interest and I think, again, we have to place this in the broad, broad context of all the revenue measures and taxing measures we have. A publication does not have a constitutional right to be subsidized to be able to survive. That's not their constitutional right, to be able to survive economically.

I am not satisfied from the record in this case, and this is the second principal basis upon which I base my decision, I am not satisfied from the record in this case that the appellee, Schenley Press, has been able to establish dire economic consequences to them because of this exemption, nor to the "industry as a whole" to wit, the grassroots press as a whole in the State of Maryland. They have demonstrated, I think, in the record a certain hardship that may cause them to have to scale back some. I think I've already addressed the matter of economic hardship.

I just think it is reaching too far to say here that this exemption allows the sales tax to have a tendency to suppress speech. I think we might make somewhat of an analogy in negligence cases, proximate cause, as distinct from some remote cause of something happening. I see nothing in the record – and I'm repeating myself, I guess – that shows any real diminution, any economic collapse of segments of the press here.

Again, I say, as a personal matter, I would be a lot happier without the regulation, a lot happier. Now, I say that not knowing all the rationale of the Comptroller when he enacted that exemption, that regulation, You know, if I would have talked to the Comptroller, he might well have convinced me that it was a very wise and proper regulation.

I don't know, but just on the face of it, you know, I'm not happy with it. But it's not my job to question the wisdom of what the Executive Branch does or the Legislative Branch. It's not my province at all to question the wisdom.

It is for these reasons that I make the finding that I do. The costs of this appeal are to be paid by the appellee. No, I'm going to divide the costs between the parties. The costs will be divided equally between the parties.

Thank you, counsel. That will conclude the hearing.

APPENDIX F: CIRCUIT COURT ORDER

COMPTROLLER OF THE TREASURY, SALES AND USE TAX DIVISION,	IN THE CIRCUIT COURT FOR BALTIMORE CITY
Appellant	92007030
v.	Case No. CL-142481
SCHENLEY PRESS, INC.,	
Appellee	

ORDER

For the reasons stated on the record in open court after hearing argument of counsel, it is this 8th day of December, 1992, by the Circuit Court for Baltimore City

ORDERED, that the decision of the Maryland Tax Court be reversed and remanded with instructions to dismiss the Petition of Appeal. Costs to be divided equally.

/S/ ROBERT I. H. HAMMERMAN

Approved as to form:

/s/ Sheldon H. Laskin, Esq.

/s/ Jack L. B. Gohn, Esq.

APPENDIX G: COURT OF SPECIAL APPEALS RULING

UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 530

September Term, 1993

SCHENLEY PRESS, INC.

v.

COMPTROLLER OF THE TREASURY

Moylan,
Motz,
Murphy,

JJ.

PER CURIAM

Filed: December 21, 1993

This case reaches us following a dispute between appellant, Schenley Press, Inc. (Schenley), and the Comptroller of the Treasury (the Comptroller) over whether Schenley, as publisher of the Baltimore Chronicle (the Chronicle), should be entitled to a sales and use tax exemption provided to newspapers.

Schenley has published the Chronicle since 1973. It is published on a monthly basis and is distributed without charge to the general public. Schenley states that the Chronicle "is published in tabloid form on newsprint, in unstitched (i.e.unbound) form." It "contains a mix of features, local, national and international news reporting, editorial comment, community activity notices, news photography, and advertising;" the ratio of advertising to substantive content is "typical of the mix found in most acknowledged newspapers." The Comptroller does not dispute Schenley's description of the Chronicle.

During the period beginning May 1, 1986 and ending April 30, 1990 (the tax period), Schenley did not pay sales or use taxes for the expenses it incurred to produce the Chronicle. After auditing Schenley's records for this period, the Comptroller's Sales and Use Tax Division (the Division) issued a notice of assessment that informed Schenley that it owed unpaid sales and use taxes plus interest and penalties in the total amount of $8,530.78.

Schenley filed timely objections to this assessment, which were presented in an adjudicator hearing before a hearing officer of the Division on December 11, 1990. Schenley contended that, notwithstanding an administrative regulation to the contrary, the Chronicle was entitled to the sales tax exemption for the printing and sale of newspapers, set forth at section 11-215(c) of the Tax-General Article. That statute provides in pertinent part: "The sales and use tax does not apply to: (1) the printing and sale of newspa-

pers; . . . ." Md. Code (1988) @11-215(c) of the Tax-General Article. The Comptroller maintained that its Regulation, codified at COMAR 03.06.01.04A,[1] governed the definition of the term newspaper for the purpose of qualifying for the exemption, and that this regulation requires that a publication be published at least once a week in order to be considered a newspaper.

Schenley also argued that if, as a matter of administrative law, the regulation properly excluded the Chronicle from the statutory exemption, then the regulation violated the First Amendment of the United States Constitution. This was because the regulation's effect both constituted "intra-medium" discrimination by creating improper classifications among news publications and because it tended to suppress particular ideas by endangering the continued existence of the Chronicle.

The hearing officer issued an opinion dated January 29, 1991 affirming the Division's assessment subject to a minor

[1] The regulation provides in pertinent part:

.04 Newspapers

A. The sale of newspapers is not subject to the [sales and use] tax.

(1) A publication is not a newspaper unless:

(a) It is published and distributed no less frequently than once each week; . . . .

(2) The criteria set forth in §A(1), above, are minimum requirements, the meeting of which does not necessarily result in a publication being classified as a newspaper. A publication which meets the criteria set forth in §A(1), above, but which is in fact a magazine, shopping advertiser, community newsletter, tip sheet, or other publication which is not a newspaper in the common and popularly-accepted usage of the term, is not a newspaper for the purpose of this exemption. A publication is not disqualified solely because it is devoted primarily to matters of specialized interest, such as legal, mercantile, political, religious, or sporting matters.

COMAR 03.06.01.04A.

adjustment. The hearing officer observed in his decision that "[t]he Chronicle . . . looks, feels and reads like an ordinary newspaper." He, nevertheless, determined that, "[s]ince the Taxpayer had not paid the . . . tax," the assessment was correct because the Chronicle's "infrequency of publication, when measured against the Comptroller's Regulation, clearly disqualifies it from the exemption of §11-215." He rejected Schenley's administrative law argument stating that "by limiting the exemption to those newspapers that are distributed at least once every week" the Comptroller properly used his power "to adopt reasonable regulations to administer . . . the sales and use tax" and that the regulation "merely adopted the commonly understood meaning" of the term newspaper. The hearing officer declined to respond to Schenley's constitutional argument, finding that "the power to declare a statute or regulation unconstitutional rests with the judiciary."

Schenley appealed to the Maryland Tax Court. The Tax Court heard extensive evidence concerning community newspapers in general, and the Chronicle in particular. Through the testimony of two journalism professors, who testified as experts, Schenley attempted to show that 1) the Chronicle was a newspaper "as that term is used both professionally within the journalism profession, and in common parlance;" and 2) the Chronicle is a "community newspaper" that performs a function similar to that of "metropolitan daily newspapers, but on a different scale, and hence in a complementary way." Although both professors testified that monthly publications may be considered newspapers to the extent that they report on events that occur during the interval between issues, each also testified that frequency of publication is relevant to classifying a publication as a newspaper. Alice Cherbonnier, the Chronicle's managing editor, testified that the publica-

tion covers a broad range of news topics, provides a forum for individuals to express their views, and includes an insert called the Sentinel which "disseminate[s] thoughtful information regarding issues and stories that would not normally see the light of day. . . ." She also testified that, if Schenley were required to pay the tax assessment, it would exhaust the paper's "libel fund" and generally impair the financial health of the publication. If Schenley were to have paid the tax as it was incurred, Ms. Cherbonnier surmised that would have caused a five percent cutback, which "probably could have caused us to print four fewer pages per issue."

In an oral opinion, the Tax Court declared the regulation void, determined as a factual matter that the Chronicle was a newspaper, and reversed the assessment against Schenley finding that Schenley qualified for the exemption within the meaning of the statute. The court reasoned that, although "[t]he Comptroller can define the term newspaper, . . . he cannot exclude by rule or regulation what would be commonly understood to be a newspaper." Otherwise, the regulation "would not be in accordance with law." The Tax Court did not reach Schenley's constitutional arguments.

The Comptroller appealed the Tax Court's ruling to the Circuit Court for Baltimore City. That court (Hammerman, J.) reversed the Tax Court's determination holding that: 1) the Comptroller issued the regulation pursuant to his legitimate authority, that there was a rational basis for the regulation, and that its definition of newspaper was consistent with the statute; and 2) that the regulation was not unconstitutionally discriminatory.

Schenley appeals, presenting the following questions for our review:

> 1. Whether the Baltimore Chronicle, a monthly newspaper, is entitled to claim the exemption from sales and use tax accorded by the Legis-

lature to "newspapers" despite the Comptroller's regulation limiting the exemption to newspapers published weekly or more frequently?

2. Whether the Comptroller's regulation denying Maryland's exemption of newspapers from the sales and use tax, as applied to Schenley, is inconsistent with the First Amendment of the United States Constitution?

3. Whether the Comptroller's hearing examiner and/or the Maryland Tax Court should have considered challenges to regulations claimed to be unconstitutional?

4. Whether the circuit court violated due process in failing to reopen the record to hear evidence on constitutional issues in light of the court's ruling that it was the lowest tribunal empowered to rule on these issues?

The issues presented in questions 1 and 2, the validity and constitutionality of the regulation, are questions of law. Accordingly, the court below was (and we are) free to substitute its judgment for that of the Tax Court. See Ramsay, Scarlett & Co., Inc. v. Comptroller, 302 Md. 825, 834 (1985).

(i)

Schenley first argues that the regulation is invalid because it unreasonably limits the term "newspaper" as used in the statute itself.

The threshold question presented by this argument is whether Regulation 03.06.01.04A is a legislative rule or an interpretive rule. A legislative rule is a regulation adopted pursuant to statutory authority that possesses the weight of law, Maryland Port Admin. v. John W. Brawner Con-

tracting Co., Inc., 303 Md. 44, 60 (1985); legislative rules have the "force" of statutes. Waverly Press, Inc. v. State Dep't of Assessment & Taxation, 312 Md. 184, 191 (1988). Interpretive rules, in contrast, are not adopted pursuant to rulemaking power "expressly confer[red]" by a statute; instead, they "only interpret the statute to guide the administrative agency in the performance of its duties." Id. (quoting Comptroller of the Treasury v. M. E. Rockhill, Inc., 205 Md. 226, 234 (1954)).

We, therefore, must determine whether the Comptroller adopted the Regulation's explication of the term "newspaper" pursuant to expressly conferred rulemaking power. This precise question was analyzed by the Court of Appeals in Maryland Pennysaver Group, Inc. v. Comptroller of the Treasury, 323 Md. 697 (1991). We will not repeat that Court's thorough discussion of the Regulation's evolution; instead, we will simply restate the Court's conclusion concerning what, we repeat, is the same regulation now before this court: "Regulation .05, pre- and post- 1979, is a legislative rule." Id. at 708. Because the Pennysaver Court found Regulation .05 to be a legislative rule, it concluded that the regulation must be accorded "more than mere deference or weight. It can be set aside only if the [Comptroller] exceeded his statutory authority or if the regulation is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Id. at 709 (quoting Batterton v. Francis, 432 U.S. 416, 426 (1977) (citations and footnotes omitted)).

Schenley asserts that Pennysaver is not controlling here because the General Assembly repealed the Comptroller's authority to define terms when it recodified the relevant taxing provisions in former Article 81 into the now current Tax-General Article. Schenley claims that since section 2-103, when recorded, eliminated the words "to define any

terms used herein," this recodification demonstrates the legislature's intention to repeal the Comptroller's authority to define undefined terms. Thus, Schenley argues: 1) when the Legislature revoked this authority, "the rulemaker loses the ability to promulgate rules based on the earlier delegation;" and 2) the existing definition is "swept away" and "except as to proceedings past and closed, the statute is considered as if it had never existed." Brief of Appellant at 16 (quoting 1A Sutherland, Statutes & Statutory Construction §23.33, at 417 (4th ed., 1985)).

Schenley's argument is unpersuasive. Prior to the 1988 recodification, the statutory provision granting the Comptroller the authority to promulgate regulations provided that:

> In addition to the powers granted to the Comptroller in this subtitle, he is hereby authorized and empowered:
>
> (a) Rules and regulations. – To make, adopt, and amend such rules and regulations as he shall deem necessary to carry out the provisions of this subtitle and to define any terms used herein.

Md. Code (1957, 1980 Repl. Vol.) Article 81, §365(a) (emphasis added). Following the 1988 recodification, the statute authorizing the Comptroller to adopt regulations stated: "The Comptroller shall adopt reasonable regulations to administer the provisions of the tax laws listed in §2-102 of this subtitle." Md. Code (1988) §2-103 of the Tax-General Article." This newly combined language was "rephrased to state expressly the broad duty of the Comptroller to adopt regulations to carry out the provisions of all of the tax laws that the Comptroller administers under [the] Article." Revisor's Note, Md. Code (1988) §2-103 of the Tax-General

Article.[2] Moreover, the Revisor's Note explicitly stated that the new language "combine[d] without substantive change" numerous provisions formerly found in scattered sections of the code. This clearly indicates a legislative intent not to revoke the Comptroller's power to define terms. See Motor Vehicle Admin. v. Seidel Chevrolet, Inc., 326 Md. 237, 251-53 (1992).

Moreover, even if somehow the legislative reenactment was intended to sweep away the Comptroller's authority to define terms, such a change would merely affect the Comptroller's future authority to define terms. Nothing in the plain language of section 2-103 could be construed to nullify prior regulations defining existing terms.[3] That is, even if we were to accept Schenley's argument, we could

[2] Section 2-102 states that, inter alia, "the Comptroller shall administer . . . the sales and use tax." Md. Code (1988) §2-102 (8) of the Tax-General Article.

[3] Schenley's sole authority in support of its argument to the contrary is In re Opinion of the Justices, 575 A.2d 1186 (Del. 1990). That case is of little assistance to Schenley because the Delaware Supreme Court merely declined to consider whether a constitutional amendment requiring legislative approval of any fees charged by an agency applied to fees existing as of the date of the amendment's enactment – a question not before the Court. Id. at 1190. Furthermore, the Court stated that it was not "opining on the validity of any permit fees 'now charged,' which were established or increased subsequent to the enactment of [the amendment]." Id., (emphasis added). Here, the Comptroller's regulation was "established" prior to the legislature's act. Furthermore, consistent with the rule that statutes are not to be repealed by mere implication (see State v. Harris, 327 Md. 32, 39 (1992)), administrative regulations should not be repealed by implication, unless the subsequently enacted statute conflicts with the regulation or its authorizing statute thus preventing the provisions from standing together. See Dugas v. Lumbermens Mutual Casualty Co., 587 A.2d 415, 420 (Conn. 1991).

not conclude anything more than a possible intent to repeal the Comptroller's authority to adopt definitions. We could not discern an intent to repeal an existing definition. This conclusion is bolstered by the strong presumption in favor of prospective application for newly adopted statutes. See Granahan v. Prince George's County, 326 Md. 346, 357 (1992). Accordingly, we hold that Regulation 03.06.041.04A remains a legislative rule regardless of the recodification.

As such it can only be set aside if "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Pennysaver, 323 Md. at 709 (citations omitted). Throughout the course of this case, the reasonableness of the Comptroller's regulation, excluding from the definition of "newspaper" a monthly publication such as the Chronicle, has been debated. But for the frequency of publication requirement, the hearing officer concluded that the Chronicle "looks and feels like a newspaper." Regardless of the factual conclusion that it "is like a newspaper," the issue here is whether the Chronicle is a newspaper within the meaning of section 11-215 as interpreted by the Comptroller's regulation. A reviewing court will not set aside a regulation even if we "would have interpreted the statute in a different manner." Pennysaver, 323 Md. at 708 (quoting Batterton, 432 U.S. at 425). Moreover, many of the dictionary definitions offered in this case state that a newspaper is usually published weekly or more frequently. See, e.g., Webster's 3d New Int'l Dictionary (1976) ("a paper that is printed and distributed daily, weekly, or at some other regular and usually short interval"); see also Md. Code (1957, 1990 Repl. Vol.) Art. 1, § 28 ("'newspaper' . . . mean[s] . . . a publication that . . . at least once a week . . . has been published . . . ."). When both dictionary and statutory definitions suggest that a newspaper is "usually" published weekly, a court cannot conclude that the

Comptroller's regulation, which incorporates this concept in its definition of "newspaper," is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Pennysaver, 323 Md. at 708 (citations omitted).

(ii)

Schenley next argues that, assuming Regulation .05A is consistent with §11-215, the exclusionary effect of the regulation violates the First Amendment of the United States Constitution. Schenley contends that the First Amendment "does not countenance" taxing provisions that differentiate among speakers "within the same medium [intra-medium discrimination]."

In Bancroft Information Group, Inc. v. Comptroller of the Treasury, 91 Md. App. 100 (1992), we recently considered the facial constitutionality of the frequency requirement when it was challenged by the publisher of a monthly newsletter. Although the publication was referred to as a newsletter, not a newspaper, neither the parties nor the court relied on any factor other than frequency of publication to consider the regulation's constitutionality. Id. at 110-11. In fact, the publisher conceded that it "can do no more than guess at what about it, other than its periodicity, offends the Comptroller." Id. at 108. The publisher implied that the Comptroller's action might be somehow connected to the publication's content; however, we took note of the fact that most of the record "focused on the frequency of publication requirement" and observed that:

> [T]he denial of the refund in this case was based, not on what was published in the newsletter, but on how many times it was circulated. Here, the Comptroller did not determine The Maryland Report's tax status based on its content–which the Supreme Court found constitutionally offensive in Arkansas Writers' Project [v. Ragland, 481 U.S.

> 221 (1987)]. Instead, he based his determination on how many times it was published. This is a content-neutral criteria, which does not "restrict expression because of its message, its ideas, its subject matter or its content." Arkansas Writers' Project, 481 U.S. at 229, quoting Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972). Thus it does not raise the same type of constitutional suspicion.

Bancroft, 91 Md. App. at 110. We upheld the regulation and its application to the publisher because "there [was] nothing in the record of the case . . . to indicate that the frequency of publication requirement in the regulation is directed toward the suppression of ideas." Id. at 111.

Schenley asserts that Bancroft is not dispositive here because it did not "address intra-medium discrimination," which, Schenley asserts, is "not countenanc[ed]" by the First Amendment. Schenley's contention that the Supreme Court's holdings flatly prohibit intra-medium discrimination misapprehends the Court's teachings concerning purported differential taxation of media entities. The Court began this line of authority almost sixty years ago in Grosjean v. American Press Co., Inc., 297 U.S. 233 (1936). There, the Court declared unconstitutional a gross receipts tax levied on the advertising revenues of publications having a circulation greater than 20,000 copies per week. Id. at 244-45. The Court reasoned that the tax was "bad," because it was "a deliberate and calculated device in the guise of a tax to limit the circulation of information. . . ." Id. at 250.

Within the last 10 years, the Court has revisited this issue on three occasions. See Leathers v. Medlock, __ U.S. __ 111 S. Ct. 1438 (1991); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987); and Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 576

(1983). Minneapolis Star addressed "the question of a state's power to impose a special tax on the press and, by enacting exemptions, to limit its effect to only a few newspapers." Minneapolis Star, 460 U.S. at 576. Minnesota had imposed a use tax on the cost of paper and ink used for the printing of publications exempting, however, the first $100,000 of such purchases by a publication during any calendar year. Id. at 577-78. After applying the exemption, the tax affected in 1974 only 14 of 388 newspapers in the State. Id. at 578. The Court declared this tax unconstitutional "not only because it single[d] out the press, but also because it target[ed] a small group of newspapers." Id. at 591. The Court held that "[a] tax that singles out the press, or that targets individual publications within the press . . ." violates the First Amendment in the absence of a "satisfactory justification." Id. at 592-93.

Arkansas Writers' applied these holdings to invalidate an Arkansas sales tax exemption whose applicability was governed by the content of the publication. Arkansas Writers', 481 U.S. at 234. The Court found the exemption in violation of the First Amendment because it treated magazines differently depending on the subject matter included in the publication (the exemption applied to publications which covered, inter alia, religion and sports). Id. at 230. The Court reasoned that the First Amendment's protection of freedom of the press is "entirely incompatible"with a tax which is differentially applied to a small group of publications when the differentiation requires "official scrutiny of the content of the publication." Id.

Most recently, the Court, in an opinion by Justice O'Connor (who authored Minneapolis Star), clarified this line of authority in upholding a different Arkansas sales tax exemption that favored satellite television services, newspapers, and magazines while ignoring cable television opera-

tors. Leathers, 111 S. Ct. at 1447. The Court held "that the State's extension of its generally applicable sales tax to cable television services alone, or to cable and satellite services, while exempting the print media does not violate the First Amendment." Id. The Court specifically rejected the proposition that "intermedia and intramedia discrimination, [with or without] evidence of intent to suppress speech or of any effect on the expression of particular ideas, violates the First Amendment." Id. at 1445.

Schenley contends that a "fair reading" of Grosjean and Minneapolis Star "makes clear that the heart of the First Amendment violation there was nothing more complex than intra-medium discrimination." Schenley ignores the attention paid by the Court in Grosjean to Louisiana's motivations in imposing the tax on a specific group of newspapers. Grosjean, 297 U.S. at 350-51; see also Pennysaver, 323 Md. at 712 n.8 (discussing Grosjean, Maryland's Court of Appeals noted that the late Huey Long stated there was "no reason why the State of Louisiana should not receive two cents for each of [the publications'] lies." (citations omitted)). Schenley also ignores the fact that, in Minneapolis Star, the Court's concerns focused first on the fact that the State had singled out the entire press for a special tax, and second on its differential application. Minneapolis Star, 460 U.S. 592-93.

Our reading of these cases is further bolstered by the Supreme Court's decisions in Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946), and Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946). Both opinions rejected arguments that the Fair Labor Standards Act (FLSA) violated the First Amendment by exempting "weekly or semi-weekly newspaper[s] with a circulation less than three thousand the major part of which circulation is within the county where printed and published." FLSA

§13(a)(8). The Court declared that "[n]othing in the Grosjean case forbids Congress to exempt some publishers because of size [or frequency of publication] from either a tax or a regulation which would be valid if applied to all." Oklahoma Press, 327 U.S. at 194. Accordingly, a "fair reading" of Minneapolis Star must be focused on its analysis of the discriminatory application of "a special tax [imposed] on the press." Minneapolis Star, 460 U.S. at 576.

Although it is true that the precise question in Leathers concerned inter-media differentiation, the Court's analysis focused on discrimination between speakers regardless of medium. Moreover, the Leathers Court specifically stated that "a tax scheme that discriminates among speakers does not implicate the First Amendment unless it discriminates on the basis of ideas." Leathers, 111 S. Ct. at 1445. See Regan v. Taxation with Representation of Washington, 461 U.S. 540, 548 (1983). "[A] legislature is not required to subsidize First Amendment rights through a tax exemption or tax deduction." Leathers, 111 S. Ct. at 1445; see also Taxation with Representation, 461 U.S. at 546; see also Cammarano v. United States, 358 U.S. 498, 513 (1959). The crucial point was that "governmental action that places differential burdens on members of the press" does not violate freedom of the press when there is "no indication that the government . . . singled out the press for special treatment . . . or that the exemption was a 'deliberate and calculated device' to penalize a certain group of newspapers." Leathers, 111 S. Ct. at 1446-47; see also Mabee, 327 U.S. at 184; and Oklahoma Press, 327 U.S. at 194. Consequently, the Leathers Court concluded: "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas." Leathers, 111 S. Ct. at 1447.

Schenley has offered no evidence to support its contention that the frequency requirement "tends to suppress particular ideas" or "differentiates on the basis of taxpayer speech."[4] Here, as in Bancroft, there is nothing to support the conclusion that the requirement does anything more than to render Schenley responsible for paying the generally applicable sales and use tax. Indeed, as the Court of Appeals stated in Pennysaver:

> The Maryland sales tax is extremely broad based. Persons who own no real property and whose income, if any, is insufficient to require the filing of a return pay the sales tax on their taxable purchases. Within the medium of printed matter, MPG enjoys the company of publishers of hard-cover and paperback books, of magazines sold over the counter, of booklets, brochures, pamphlets, tracts, leaflets, folders, circulars, maps, directories and countless other kinds of published materials taxed in whole or in part at some stage in the process from publication to distribution to the ultimate user.

[4] One expert did assert that 40% of community newspapers, responding to an incomplete nationwide survey, publish less frequently than once a week; however, that expert also stated that the chief purpose of community newspapers is to "focus on the news" and the difference between them and major daily papers is one of "context rather than the media." Furthermore, he stated that there is very little competition between the major papers and the community papers because their readers tend to read both. Similarly, although Ms. Cherbonnier, the Chronicle's managing editor, asserted, in response to a question from her counsel, that there was an effort on the part of the Chronicle to give a forum to "voices" that do not get heard much "other places," her explanation of those "other voices" makes it clear that they espouse points of view found in daily newspapers, albeit there espoused by others.

Pennysaver, 323 Md. at 714. The frequency of publication requirement is a content-neutral regulation that neither suppresses particular ideas nor differentiates between publications on the basis of their content; it certainly has not been shown to do either in this case. Accordingly, the regulation neither on its face nor as applied violates the First Amendment.

(iii)

Schenley raises in its third and fourth questions two aspects of the same complaint. The company argues that its rights were violated by the "bifurcated" procedure employed by the various decision-makers in the consideration of its constitutional arguments. Schenley urges a remand to the circuit court mandating that it remand this dispute to the Tax Court to consider Schenley's constitutional challenge. Alternatively, it urges us to remand the case to the circuit court requiring it to re-open the record for the purpose of hearing additional evidence on the issue of whether the Comptroller's regulation had the tendency to suppress particular ideas.

Schenley's first contention, that administrative agencies should decide constitutional complaints about their rules and actions because they have the authority to decide the constitutionality of their regulations in their quasi-judicial capacity, is not without merit. This Court has previously observed that "[tlhe validity of the application of a statute... usually involves factual issues which have been committed to the expertise of administrative agencies by the legislature and in many instances the constitutional issue may never arise if the administrative remedy is exhausted." Verkouteren v. Supervisor of Assessments of Montgomery County, 38 Md. App. 216, 221 (1977). In Verkouteren, we held that declaratory relief was not appropriate prior to administrative action where the resolution of a factual issue

might prevent the constitutional issue from arising. Id. at 222. Our holding was premised, in part, on the principle that courts may not be employed to bypass the expertise of the agency. Id. at 219. We, nonetheless, decline to hold that a dispute must be remanded to an administrative agency simply because it found it unnecessary to decide a constitutional issue which had been raised and thoroughly argued before it. To do so would violate the long standing principle that "the Judiciary is the ultimate authority to determine whether constitutional limitations have been transcended . . . ." Maryland Committee for Fair Representation v. Tawes, 228 Md. 412, 426 (1962), rev'd on other grounds, 377 U.S. 656 (1964).

Schenley's argument that its due process rights were violated by the circuit court's failure to reopen the factual record also fails. Schenley waived any complaint on this point during the following colloquy:

> [Schenley's Counsel]: Am I to understand that the issue to which we are addressing ourselves at this hearing is simply whether there is a suppression of particular ideas problem? Is the Court anticipating receiving additional testimony or merely –
>
> THE COURT: Well, you know, I made the statement and then questioned in my own mind that we have to go on the basis of the record [of the Tax Court]. But this is not something that you really presented a record on below; is that correct?
>
> [Schenley's Counsel]: Oh, I think I did, Your Honor.
>
> [Counsel for the Comptroller]: Yes, you did.
>
> THE COURT: You did? Well, if you did, it seems to me we go on the record.

[Schenley's Counsel]: All right. Then that's fine. Then all we are doing actually is having a very finely tailored set of briefs tailored specifically to this issue.

THE COURT: That's right. I mean, as long as you have argued this point, as long as you have – because I don't have the record – as long as you have presented your evidence on it and gave it your shot, then we go on the record.

[Schenley's Counsel]: I believe that we have done so, Your Honor.

(emphasis added). Moreover, our examination of the record bears out this conclusion. The Tax Court received evidence and heard extensive arguments on all of the constitutional arguments Schenley presses here. Accordingly, the trial court neither abused its discretion nor violated Schenley's due process rights in refusing to remand the case to the Tax Court.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

APPENDIX H: COURT OF APPEALS RULING

SCHENLEY PRESS, INC.

v.

COMPTROLLER OF THE TREASURY

In the

Court of Appeals

of Maryland

Petition Docket No. 629

September Term, 1993
(No. 530, September, 1993, Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, and the answer filed thereto in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ ROBERT C. MURPHY
Chief Judge

Date: March 23, 1994